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the needs of the people and their views upon public acts. In that part of our governmental system in which the executive is most prominent, namely, in our city governments, the role of these associations has been wonderfully enlarged within the last two decades, and as we in our national political institutions come to rely more and more upon the one-man power we must aim to strengthen and enlarge the scope of these great civic societies in the national field.

THE BEGINNINGS OF WAR.

THEODORE S. WOOLSEY.

The topic for discussion given me by our Executive Committee was originally, as printed in our programme, "What Constitutes a Declaration of War," suggested doubtless by the early stages of the present war in the East. But as full liberty was granted to alter this subject, I shall somewhat broaden my title and ask your attention to those steps, diplomatic and then forcible, which close negotiations and begin hostilities and which may perhaps properly be summed up under the caption "The Beginnings of War." Of these steps a Declaration of War may or may not be one.

Here lie two main topics or lines of inquiry:

(1) At what point in the discussion of a serious international question will a resort to violence be the natural next step and not a treacherous act?

(2) From what moment does a war date?

If it were necessary, or even customary that a formal declaration of intent to make war beginning at a set time, should precede hostilities, neither of these inquiries would be needful. Perhaps such a rule is desirable. The whistle of the referee is at once a fair warning and marks a fixed moment. It legalizes the beginning of violence. But although war is called a game and has highly conventionalized rules, it is a game without a referee. The whistle must be blown by the disputants, not by a third party. And if there is no whistle—no declaration—we must try to find an equivalent for it, a di-

plomatic status which means the same thing; which is so fair a warning as to preclude the charge of treachery if violence follows, for no state would be thought willing to attack another out of a clear sky.

The interval between peace and war is not measurable time; it is rather the process of balancing national desires, passions, fears, susceptibilities, until some consideration, light as air perhaps, turns the scale. The change from peace to war then is primarily a mental change, a matter of intention. But mental attitudes are not patent, while facts are; war may be a logical conclusion yet not a fact; we look to see the intent converted into action before we say that war has begun. Now since in this latter day, the whole world knows at its breakfast table pretty well what is taking place at the chancelleries, the gradual change in mental attitude of one state toward another can be seen, studied, perhaps influenced, by all other states. There may be uncertainty but there is no deceit. Every state department, every stock exchange, is weighing the probabilities and watching for the irrevocable word. What word is final, what word means war, that is a matter of conventional diplomatic usage.

All this is a statement, in sentimental terms, as well as a partial explanation, of the fact, that declarations of war in advance of hostilities, are not necessary or even customary, because superfluous.

Perhaps it is worth while to state here, what Declarations of War are supposed to be and what they really are. For there are other papers issued early in a conflict, defining other relations, which are apt to be mistaken for them. There are three possible interests in war to be looked out for, and the conditions to govern them officially stated. (1) Those of the combatants themselves; what methods of war they will employ; what grace they will give to one another's property; what duties they will exact from their own peoples. (2) Each must notify the neutral of the fact of war and define the rules to be applied to him. Until thus notified, neutral states recognize no duties. (3) The neutral in turn specifies what rights he will lay claim to and warns his subjects of their

duties in the premises. No one of these announcements properly speaking, is a Declaration of War, which is the bare notification of one state to another that a condition of hostilities exists between them and dates from a day certain.

But a Declaration of War is commonly supposed to be a warning, in advance of hostilities, that war *will* begin on a day certain.

That a declaration is not essential to the beginning of legal warfare is accepted by most writers on the subject and agreed to by the prize courts. Thus Sir William Scott, giving judgment in the case of the *Eliza Ann* in 1813, said "War may exist without a declaration on either side. It is so laid down by the best writers on the law of nations."¹ And Mr. Justice Sprague in the United States District Court for Massachusetts, in 1862 affirmed that "War in all its fulness may exist without a previous declaration."² With these opinions the usage of nations agrees. General Sir J. Frederick Maurice at the instance of his government, has compiled a list of wars in the last two centuries which were or were not preceded and introduced by a declaration. "Between 1700 and 1870," he writes, "less than ten instances have occurred in which Declarations of War have been issued prior to hostilities. On the other hand 107 cases are recorded during this period, in which hostilities have been commenced by European powers and by the United States without declaration. The War of 1870 offered the unique example of a notice (sent by France to Germany) to the Court of the assailed power, prior to hostilities. Moreover," he adds, "no state has more publicly sanctioned surprises than the United States, its form of a Declaration of War being a vote of Congress that a state of war actually exists between the United States and such and such a power."

But, it may fairly be asked, if declarations are so unusual in advance of hostilities, why should they be made at all? Sometimes they are not made. When they are issued, however, sub-

¹ The *Eliza Ann*. 1 Dods, 244.

² The *Amy Warwick*. 2 Sprague, 123.

sequently, I think the motive is to have a definite point from which to date the change of jural relations in the subjects of the declarant. For war in the twinkling of an eye works a revolutionary change in the legal relations of two peoples, their partnerships, their debts, their whole commercial intercourse. So that for domestic purposes it is convenient to know when war began.¹

Not only is a declaration not necessary to the legal beginning of war, as evidenced by the opinions of jurists, the dicta of admiralty judges and the usage of states, but even when made it does not necessarily mark the commencement of war; may in fact be largely disregarded as an important factor in such commencement. This will be made clear later. It is referred to here to emphasize the point that the thing to be kept in mind in the crisis of an international difference, is not what one nation or the other may declare, but what they actually do. It is by facts not assertions that the status is judged.

We are now in a position to turn to the first inquiry proposed, viz., at what point in the discussion of a serious question between states, a resort to violence will be the natural next step and not a treacherous act.

If declarations are not *de rigueur*, are in fact a negligible factor, if the actual facts in the case are solely determinative of the position of affairs, the answer to such a question must be this: when the peaceful struggle of diplomacy is put an end to by conventional language; still more when the intercourse of diplomats is broken off by departure or recall; most of all when a demand is formulated as essential to further friendly relation (an ultimatum) and is refused, expressly or by implication—then the whole world knows that a breach has come, that in point of fact friendly relations have ceased. This justifies violence, though it does not necessarily mean violence. I ask again what is this conventional language which means a breach—what is the irrevocable word? Let us take two or three recent cases by way of illustration and answer. And first our own war with Spain. In this case there was do-

¹ Griswold *vs.* Waddington [15 Johnson's Reps., 57].

mestic legislation which was tantamount to a declaration of war; there was a break in diplomatic intercourse; there was an ultimatum sent to Spain which the Spanish Government dodged by the device of dismissing the American minister before he could deliver it; there was violence ordered and committed; finally there was a declaration of war retroactive in its terms, a curious sequence. Here is the chain of events. First the Senate Resolution that Cuba is and ought to be independent; that Spain withdraw its forces and relinquish its authority; that the President be authorized to use force to make the resolution effective; but that the United States disclaimed any intention of itself possessing Cuba. In conference the other House accepted this April 19th, and the President signed it, on the 20th. It was communicated to the Spanish minister on the 21st, and thereupon he left the country. Also on the 21st the fleet was ordered to Havana and a blockade was proclaimed. On the 23d the first hostile shot was fired to heave to the Buena Ventura. On the 25th came the formal Declaration of War, but stating that war had existed since the 20th. Of these acts surely the joint resolution of Congress was enough to justify violence, unless Spain by an immediate surrender had "relinquished authority" and promised to withdraw her forces. The dismissal of the minister at Madrid made the breach complete.

Or look at the events immediately preceding the Boer invasion of Natal. An offer of the franchise to English subjects after five years' residence was made, but coupled with a demand for the renunciation by Great Britain, of all claim to interfere in the domestic affairs of the Transvaal. This was refused by Mr. Chamberlain. Parliament voted supplies; reserves were called out; an army corps mobilized; transports chartered; troops concentrated on the Natal border. Accordingly the Boers, on October 9th, sent a conditional ultimatum giving a definite limit for the withdrawal of troops under penalty of war and on the 12th invaded Natal. There was no Declaration nor was there any treachery. The ultimatum rejected was fair and sufficient warning.

Turn now to the events preceding the present war in the

East, the justification of which has nothing to do with our question. There had been protracted negotiations between Russia and Japan on a vital matter, the disposition of Manchuria and Korea. Repeatedly had Japan asked for a final and favorable answer. Meanwhile Russia had heavily reinforced her Manchurian army instead of evacuating the province as promised.

She had moreover despatched nine additional ships of war to the East, three of them battle ships. Then Japan determined to be duped no longer and at the end of January insisted on an answer to her proposal for a settlement. Count Lamsdorff thought an answer possible February 2d, but refused to name any definite date. The Japanese government waited until February 5th, then instructed their minister at St. Petersburg to hand a note to the Russian Government, justifying their action and using this language.

“In the presence of delays which remain largely unexplained, and naval and military activities which it is difficult to reconcile with entirely pacific aims, * * * the Imperial Government have no alternative than to terminate the present futile negotiation. In adopting that course, the Imperial Government reserve to themselves the right to take such independent action as they may deem best to consolidate and defend their menaced position as well as to protect their established rights and legitimate interests.” Simultaneously—this was on February 6th, at four in the afternoon—Mr. Kurino was instructed to announce in writing his intended departure from St. Petersburg. The same day Baron Rosen, in Tokyo, was informed of these facts in very much the same language. The naval engagement off Chemulpo occurred February 8th, and the attack on the Port Arthur fleet a few hours later, but independently and in ignorance that a blow had already been struck. Both powers declared war on the tenth.

In each of these cases violence was done before the declaration of war, if any, was made. In the two former cases there certainly was apparent no desire to catch an enemy unawares. Regular, customary, steps led up to a breach, then fighting began. Was it not true also as between Japan and

Russia that an interchange of notes convinced Japan that she was being played with; that she warned Russia of her intention to stop diplomacy and safeguard her threatened interests; and that she broke off peaceful relations by withdrawing her minister. Japan, in other words, took the conventional steps to indicate that peace no longer prevailed. Is Russian diplomacy so simple-minded as to have really misunderstood? General Maurice, in his "Hostilities without Declaration of War" already alluded to, gives numerous cases where he believes a desire to take another state unawares, to have been the motive of hasty violence. Whether this is true and whether it is legitimate or not, I venture to say that it is scarcely possible to-day. For hostilities mark a state of affairs of which the civilized world is now perfectly aware in advance. Instead of a declaration of war to announce the beginning of hostilities, we have therefore some break in the chain of diplomacy which amounts to precisely the same thing, and there is no more desire to take an enemy unawares or likelihood of doing so, in the one case than in the other. I would not be understood as saying that the cessation of diplomatic intercourse between two states always means war. That may be done to mark displeasure which has not gone the length of violence; it is not infrequent; it has sometimes lasted for years. But when preceded by warlike preparation and attended by fair warning couched in the language of diplomacy, it certainly does justify war, and usually produces it.

Turn now to the second of the questions proposed: from what moment does a war date? I take the liberty of using here with changes, an article contributed by me some years ago to the Yale Law Journal.

It has been already intimated that a declaration, even if made, is a comparatively unimportant factor in dating a war, because it does not necessarily or often, precede hostilities. It is a warning issued by a state to its own people, or to the neutral, that war has begun, and not a warning to the enemy that war will begin at a certain future date. Marking thus a status already existing, it cannot itself originate that status. The outbreak of war gives rise to the declaration, not the declara-

tion to the outbreak. If war does not date from a declaration, it must date from a fact then, so far at least as the right of prize is concerned, namely from the fact of violence.

Snow's Manual for our Naval War College (p. 79, 2d ed.) states this in so many words: "When there is no declaration, war dates from the first act of hostilities, and even if there should be a subsequent declaration, the beginning of hostilities still remains the date of the beginning of the war." So also Hall (International Law, 2d ed., p. 349): "If the above views are correct, the moment at which war begins is fixed as between belligerents by direct notice given by one to the other, when such notice is given before any acts of hostility are done, and when notice is not given, by the commission of the first act of hostility on the part of the belligerent who takes the initiative." And Owen, in his "Declaration of War," says, p. 12, "War having once been commenced, a formal declaration to the enemy can, it would seem, be formulated and communicated at leisure, if it so please the aggressor," citing the fact that "in 1877 the Russian declaration of war against Turkey was preceded by some hours by the entry of the Russian forces into Turkey." A similar priority of armed conflict to legal declaration occurred in our own war with Mexico, the battles of Palo Alto and Resaca de la Palma having been fought before Congress recognized by Act a state of war as existing, and many similar instances can be found, as in the late war between China and Japan.

It is the fact of violence, then, and not the declaration of a status, upon which we must really fix our eyes, if we should ask when war begins. And this introduces the main inquiry of our second topic. Of what nature must that act of violence be which, so to speak, originates a war, which is paramount in the eye of the law to an announcement by proper authority that war began on a certain date?

Here we are on uncertain ground.

There must naturally be some official warrant to a ship of war for aggressive action, or a clear case of self-defence, else its making war may be disavowed. Even with this, as Professor Takahashi has said, preparation for war is not war *de*

facto itself. It is also true that there may be acts of violence, yet no war, as was the case between the United States and France at the end of the eighteenth century. But with conflict a fact, and legislative or executive sanction not wanting, the first moment of conflict is the date from which war is reckoned, not the moment of sanction or the moment when orders for violent action were given. The question thus relates not so much to the date of a certain event as to the character of that event.

In land warfare, actual conflict between states must involve the invasion of one of them. There is thus the crossing of a boundary, the use of force within a foreign jurisdiction, to mark the changed relations and to date them from.

But the high seas are subject to no state's sovereignty. Upon their levels lie no boundaries to be crossed; within their confines, no status of occupation to be defined. If two ships of war meet and fight, and their action is not disavowed, that constitutes the beginning of war. But suppose that one of these ships of war meets a mere merchantman of the other nationality, can the war be begun by her capture as legitimately as by battle with the armed ship?

The argument certainly sounds rather paradoxical. The capture is valid because war exists; war exists because the capture has taken place. And yet so far as reason goes, this is a logical position. For preying upon an enemy's commerce, as the law exists, is as legitimate a part of warfare as the capture of his ships of war would be. Moreover, the attack on his property cannot open and legitimate the war, cannot make subsequent capture legal, and yet itself be illegal. But logic is not all, or even the major part, of a rule in International Law. The common law-bred mind wants precedent as well. What warrant is there for believing that hostilities can legally be opened by the seizure of private property other than the old usage of hostile embargo, now happily out of date? This point was raised, though not settled, in the well-known Kow-Shing affair, at the outbreak of the Japano-Chinese war, the issue turning on another fact. The Kow-Shing was an English steamer hired to convey troops to Corea, by the

Chinese government, and actually having 1,100 officers and soldiers on board, with much military material. She was sighted at 8.30 a. m., July 25, 1894, by the Japanese fleet. One of the ships composing it hove the Kow-Shing to, inspected her loading and ordered that she should follow her. The British captain agreed, but the Chinese on board threatened his life if he did so, and he signalled this fact to the Naniwa. After a considerable interval, during which the Japanese ordered him to leave his ship, which the Chinese prevented his doing, Captain Galsworthy and several others jumped overboard, their passengers firing upon them in the water. Then the Naniwa put a shot into the Kow-Shing and the latter went down. If war had begun, the merchantman, carrying Chinese troops, was a Chinese transport, no matter what her nationality might be, and as was afterwards made clear, war had begun that same morning at an earlier hour, by combat between this same Japanese fleet and two Chinese men-of-war. But this did not at once appear and the question was argued in England on other grounds. Could the attack on the Kow-Shing in itself begin the war, thus making her an enemy's transport, and legalizing the destruction of neutral property thus impressed with a hostile character? Two English jurists expressed themselves on this point. Professor Holland wrote to the *Times*: "If the visiting and eventual sinking of the Kow-Shing occurred in time of peace, or in time of war before she had notice that war had broken out, a gross outrage has taken place. But the facts are otherwise. In the first place a state of war existed. It is trite knowledge, and has been over and over affirmed by courts, both English and American, that a war may legally commence with a hostile act on one side, not preceded by declaration. * * * Whether or not hostilities had previously occurred upon the mainland, I hold that the acts of the Japanese commander in boarding the Kow-Shing and threatening her with violence in case of disobedience to his orders, were acts of war.

In the second place, the Kow-Shing had notice of the existence of a war, at any rate, from the moment when she received the orders of the Japanese commander."

This opinion, reiterated after the author was in full possession of the facts, would seem to consider the stoppage of the transport a lawful beginning of the war.

But another writer, Professor Westlake, does not go so far as this. "It is true," he wrote, also to the *London Times*, "that the commencement of war *de facto* is only valid in International Law as between the parties to the war so commenced, neutrals being entitled to notice before they can be made liable to the peculiar responsibilities which a state of war imposes on them. But the Kow-Shing was not acting as a neutral breaking a blockade or carrying contraband of war. She was a transport in Chinese service, and therefore a belligerent, if China was a belligerent. But the Japanese could not make the Kow-Shing a belligerent by attacking her," and he argues that the attack could be justified only on the ground of military necessity, or the occurrence of acts of hostility prior to it. On the point under inquiry, then, these two opinions differ absolutely. They are cited in an interesting work on those questions in International Law which arose during the Chino-Japanese war of 1894, by Professor Takahashi, who was himself detailed to accompany the fleet as adviser in such matters. He does not attempt to decide between these views, having safer ground to stand on, because there was proof of an earlier conflict. "Whether a war can be commenced by an act of search" he writes "or whether it must be commenced beforehand by some acts of hostility committed elsewhere, is a difficult legal question, and I think there is no necessity to decide it in the present case."

Upon this point, it is proper to make this comment: that every "act of hostility committed elsewhere" on sea, except a collision between ships of war under their own flags, involves visitation and search as a preliminary to capture: that this in turn would require some earlier "act of hostility elsewhere" to legalize it; and that thus we are brought face to face with something very like absurdity. It is like the jam yesterday, and jam to-morrow, but never jam to-day, which tried Alice so sorely.

We turn now to the early hours of our own war with

Spain. The official steps leading up to it have been already recited; the joint resolution of Congress; the order to blockade and its proclamation; the declaration that war existed; the publication of the rules to govern the conflict.

The first shot fired in the war was across the bows of the Spanish steamer Buena Ventura, off the Florida coast, on April 22. The first action in the war was the bombardment of the defences of Matanzas on April 27. Which of these various events, executive, legislative or military, began the war?

Clearly we cannot date it from the joint resolution of Congress declaring the people of Cuba of right independent, and warning Spain to withdraw her forces from the island, because if Spain had complied that would have been the end of it. An ultimatum is not war, though it warrants war and usually leads to it.

Nor were the order of the Navy Department establishing blockade and the President's proclamation legalizing it by the proper notification, events from which we can date, because, although war measures, they were war measures in preparation, not in being, and could not be made effective until some hours or perhaps days after their issue. In point of fact the Buena Ventura was captured before blockade was a fact.

There remains to be considered the declaration of war issued on the 25th of April, and in terms making the 21st the first day of war. For some purposes, like the dissolution of partnerships between subjects of the two belligerents, this date might be held authoritative, for others it may not be conclusive. Suppose that Spain also issued a declaration or its equivalent, and on a different date from that of the United States, which should govern? She did in fact, on the 23d of April, declare her treaties with us terminated by the "state of war existing." We are thus thrown back on the rule noticed earlier in this paper, that even if subsequently a declaration of war be made, nevertheless war dates from the beginning of hostilities, and ask whether the capture of the Buena Ventura may be included in this category. This prize case, condemned by the District Judge of the Southern District of Florida, was later reviewed in the Supreme Court of

the United States. The decision of the lower Court was reversed — three justices dissenting — but on the following ground: On April 26, President McKinley had issued a proclamation exempting from seizure Spanish merchantmen which were not engaged in the naval service of their country in any way, and which were in any United States ports or prosecuting a voyage from any such ports, the exemption to run until the 21st day of May. In point of fact the Buena Ventura had commenced her voyage from a United States port upon April 19, seven days before the exemption granted by the President was proclaimed. Did this exemption date from its issue only, or should it be held to cover ships sailing under the same conditions earlier than the proclamation? Here the Court put a liberal construction upon the President's language and probable intention. To quote the decision itself, the Court put upon the words of the proclamation "the most liberal and extensive interpretation of which they are capable," believing that the vessel was of a "class which this Government has always desired to treat with great liberality." Its argument was as follows: "The omission of any date in this clause (fourth clause of President's proclamation) upon which the vessel must be in a port of the United States, and prior to which the exemption would not be allowed, is certainly very strong evidence that such a date was not material, so long as the loading and departure from our ports were accomplished before the expiration of May 21. It is also evident from the language used that the material concern was to fix a time in the future, prior to the expiration of which vessels of the character named might sail from our ports and be exempt from capture. The particular time at which the loading of cargoes and sailing from our ports should be accomplished was obviously unimportant, provided it was prior to the time specified." One further sentence is necessary to my narrative. "Deciding as we do in regard to the fourth clause, it becomes unnecessary to examine the other grounds for a reversal discussed at the bar." This is a pity, for one of these other grounds exactly touches the subject of our inquiry. The counsel for the Buena Ventura in their very able brief had argued that whether the capture

was in violation of the President's proclamation or not, it must be held illegal because at the moment of its occurrence no war existed. "The capture was premature, and out of accord with recent practice. At the time the Buena Ventura was seized there had been no declaration of war, nor had any acts of violence occurred between the armed or naval forces of the different nations. No hostilities, which in International Law are deemed to constitute a beginning of war without a declaration, had taken place. Without a declaration, it seems that war does not begin until some blow is struck or some shot fired. * * * Nothing was done by the United States necessarily constituting an act of war, at least until the fleet reached the Cuban shore and actually established a blockade. It was while the fleet was leaving the Key West harbor, bound for the blockading stations, that this capture was made. * * * It was not in accordance with international usage to make the Buena Ventura hostile by firing upon her."

Upon this argument, unfortunately for our purposes, the Supreme Court does not comment.

In refusing to saddle costs upon the claimants, it *does* use this language, however: "In this case, but for the proclamation of April 26, the ship would have been liable to seizure and condemnation as enemy property." But even if this were true, the Court does not declare whether in its judgment, barring the proclamation, the ship would have been good prize because war was begun by its visitation, search and seizure, or because war was declared to date from the day before its seizure by a subsequent Act of Congress.

So that upon the point raised in this inquiry, we are still in the dark, so far as any judicial practice goes. Perhaps we may go, however, as far as this. If no exemption is ordered, and no declaration of war is issued, and before any conflict of arms has taken place, though this presently occurs and a war ensues, the visitation of any enemy merchant ship involving notice to her of the commencement of hostilities, is such an act of violence as to make her condemnation as prize, on the ground that war had thereby been begun, very probable.

At the risk of tediousness may I briefly restate the points I have tried to bring out :

Declarations of war are neither necessary nor usual in advance of hostilities.

When subsequently made it is for domestic purposes or at least not with intent to warn an enemy.

The world is so closely tied together that this absence of a warning deceives nobody. It is omitted not with intent to deceive, but as a superfluity.

Instead of it the political world studies the diplomatic moves of the disputants.

Any one of several events will justify a violent next step, such as an ultimatum rejected, a domestic act voting war, even the breaking off of diplomatic relations when explained by fact or statement to mean hostility, not mere non-intercourse.

The justification of violence does not mean violence necessarily; that is a next step which must be ordered. If so ordered, war dates from the first collision. This may possibly result from the mere visitation of an enemy's ship, in advance of an armed conflict.

UNNEUTRAL SERVICE.

GEORGE GRAFTON WILSON.

It is now generally admitted that the rights and duties of neutrals in time of war are correlative. It was formerly claimed that the denial or grant of the same privileges to both belligerents constituted neutrality. Such a doctrine of neutrality might make it possible for a state to deny all the privileges which the first party to the war would especially need and which the second might not need, and to grant those privileges which the second might need and which the first might not need. It was seen that such a position was not neutral in fact, if sometimes so called. Gradually a more equitable view has come to prevail. Neutrality is at present held to demand "an entire absence of participation, direct or indirect, however impartial it may be."